Supreme Court, U.S.
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No. 01-851

In the

Supreme Court of the United States

DEBORAH S. PALAC,

Petitioner,

versus

GARY R. SMITH and PRECISION ELECTRIC, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION FOR RESPONDENTS GARY R. SMITH and PRECISION ELECTRIC, INC.

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QUESTION PRESENTED

Whether the Due Process Clause of the Federal Constitution prohibits a state court from applying procedural rules in a manner that, without fair notice, deprives a plaintiff of her opportunity to appeal on a state law claim?

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STATEMENT OF THE CASE

On May 5, 2000, a judgment on a jury verdict was rendered in favor of petitioner and against respondents. This judgment on the verdict was filed by the trial court--i.e., the Trumbull County [Ohio] Court of Common Pleas--following a civil trial in which petitioner recovered $75,000.00 for personal and bodily injury that she sustained in an automobile accident. Essentially, petitioner is attempting to appeal from the May 5, 2000 judgment on the verdict rendered in a state court of Ohio.

Petitioner did not file an appeal from the May 5, 2000 judgment on the verdict within 30 days of the entry of that judgment as required by Ohio Rule of Appellate Procedure 4. Rather, petitioner filed her notice appealing the May 5, 2000 judgment on the jury's verdict on November 30, 2000. The only post-trial motion filed by petitioner challenging the jury's verdict was a motion for a new trial filed pursuant to Ohio Rule of Civil Procedure 59, which motion was filed on July 13, 2000.

Respondents did file one post-trial motion. This motion was filed on May 19, 2000 and respondents specifically moved the state trial court for a $2,000.00 credit against the $75,000.00 jury verdict. Respondents' motion expressly moved the court only "for a credit in the amount of $2,000.00 against the $75,000.00 General Verdict in favor of the plaintiff . . . ."[1] Respondents were

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[1] Nowhere in their motion did respondents ask the trial court to grant them a remittitur or to exercise the discretion that would have been required of the trial court to grant a remittitur. Indeed, the only place that the word remittitur appeared in respondents' motion was in its caption: "Motion for Credit Against Jury Verdict or Remittur."

forced to file this motion because petitioner and her trial counsel would not honor a previous express agreement by petitioner's former counsel that respondents would receive a credit against any judgment due to an advance payment that satisfied the claim of a subrogated insurer.

On October 31, 2000, the state trial court ruled on the pending post-trial motions. The state trial court ruled that respondents were entitled to a $2,000.00 credit against the jury's verdict because of the express agreement entered into by petitioner's former counsel. The state trial court denied petitioner's July 13, 2000 motion for a new trial on the basis that it was not filed within 14 days of the entry of the judgment on the verdict as required by Ohio Rule of Civil Procedure 59 and, therefore, was untimely. The [Ohio] Eleventh District Court of Appeals on April 23, 2001 dismissed petitioner's November 30, 2000 appeal noting that petitioner's failure to timely file a motion for new trial made her November 30, 2000 attempt to appeal the May 5, 2000 entry of judgment on the verdict untimely as well. On September 5, 2001, the Supreme Court of Ohio filed its entry declining jurisdiction over petitioner's appeal from the state appellate court and in its entry the Supreme Court of Ohio expressly stated it "declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question."

Obviously, the word remittitur was misspelled in the only place that it appeared in respondents' motion.

REASONS FOR DENYING THE PETITION

Respondents state that there is no substantial constitutional Due Process Clause question involved in this case and that, instead, this case concerns well established Ohio state court civil post-trial and appellate practice and procedure. Respondents state that none of the rulings of the inferior state courts which petitioner attempts to challenge were in any way based upon constitutional principles. Respondents further state that, in petitioner's opposition to their motion to dismiss in the intermediate Ohio appellate court, petitioner never asserted that her procedural due process rights or any other constitutional rights were abridged. Respondents state that, rather, petitioner's assertion that a constitutional question existed was in conjunction with her attempt to appeal to the Ohio Supreme Court and was made to that court, just as it is to this court, for no purpose other than to enable petitioner to continue her efforts to appeal.

I. THE OHIO SUPREME COURT CONSIDERED PETITIONER'S CONSTITUTIONAL ARGUMENTS IN RELATION TO THE LOWER STATE COURTS' APPLICATION OF THE OHIO RULES OF CIVIL AND APPELLATE PROCEDURE AND FOUND NO CONSTITUTIONAL QUESTION EXISTED.

1. The petitioner's citation to the decisions of other states' courts and her allegation of an apparent conflict between these decisions and the decisions of the Ohio state courts in this case is specious. First, this is not a case which developed in the lower federal courts, to which the Federal Rules of Civil or Appellate Procedure were applied, or in which a conflict among the courts of different jurisdictions may have some import. Rather, this case was

litigated entirely under the jurisdiction of the state courts of Ohio and only the Ohio Rules of Civil and Appellate Procedure were applied. Given the circumstances, it is completely irrelevant whether another state's court applying that state's procedural rules may have reached a different result than the state courts of Ohio reached in this case. Further, petitioner has cited no precedent or legal authority, other than a general citation to the Due Process Clause of the Fourteenth Amendment, which would confer upon this court the power to review how each state's courts apply the state's civil and appellate procedural rules. Likewise, petitioner has cited no specific precedent or legal authority to establish just how alleged inconsistencies among the decisions of different state's courts necessarily mean that constitutional infirmity exists. Indeed, petitioner completely has failed to establish why the alleged differences on which she relies evidence a constitutional question that must be addressed by this court or that resulted from how the state courts of Ohio applied their procedural rules in petitioner's case against respondents. Given this failure by petitioner, her bald assertion that her due process rights were violated should be rejected and this court should decline to grant the Petition for a Writ of Certiorari.

2. Petitioner's assertion that the decision of the "lower court" was erroneous is equally spurious. No court directly inferior to this court has ruled in this case; rather, the Supreme Court of Ohio was presented with petitioner's constitutional challenge to the decisions of the lower Ohio state courts. Ultimately, the Supreme Court of Ohio considered the very argument advanced by petitioner in this case and rejected that argument determining that no substantial constitutional question was presented. Although petitioner now cites different legal authority in support of her claim, that authority is really no different than what was

considered by the Supreme Court of Ohio and petitioner's argument continues to ignore the relevant analysis.

Indeed, petitioner's entire argument--i.e., that her November 30, 2000 appeal from the state trial court's judgment on the jury's verdict entered on May 5, 2000 was timely because respondents filed a motion for remittitur--is meritless. The state intermediate appellate court applied well-established Ohio precedent to determine that petitioner's appeal was untimely and the Supreme Court of Ohio considered this precedent when concluding that petitioner presented no substantial constitutional question.

Petitioner's argument in this case demonstrates her continuing failure to appreciate that not every adverse decision in the litigation or in the Ohio state courts' interpretation and application of long-standing rules of procedure and trial practice violate a right guaranteed to her by the Ohio or U.S. Constitutions. For example, petitioner absolutely has ignored the numerous instances where the Ohio Rules of Civil Procedure manifest that it is the substance of the motion or pleading which determines the character of the proceedings.[2] Additionally, petitioner's argument about the constitutional impact of analyzing

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[2] Pursuant to Ohio Rule of Civil Procedure 12, a motion styled" "Motion to Dismiss," will be treated as a "Motion for Summary Judgment" if, due to the submission of extraneous material and evidence in support of the motion, its essential character is a motion for summary judgment. Similarly, Ohio Rule of Civil Procedure 8(C) specifically contemplates that pleadings denominated as "counterclaims," but which actually are affirmative defenses, shall be treated as such. Finally, the state courts of Ohio frequently have recognized that it is the substance of a matter filed with the trial court and not its title or styling that controls when considering whether motions for relief from judgment pursuant to Ohio Rule of Civil Procedure 60(B) are filed as an attempted substitute for a timely appeal.

respondents' post-trial motion for its "form" rather than its "substance" completely ignores that respondents simply could have styled their motion for credit against the jury's verdict as a "Motion" in accord with Ohio Rule of Civil Procedure 7(B). Fundamentally, petitioner is complaining to this court about how the state courts of Ohio applied their procedural and appellate rules. Petitioner fails to recognize, though, that how the Ohio state courts applied their rules did not deprive her of the opportunity to protect her post-judgment remedies and, therefore, did not deprive her of due process of law. Petitioner simply refuses to acknowledge that it was her own failure to timely file a motion for new trial or timely file an appeal from the jury's verdict that resulted in the loss of her opportunity to challenge the jury's verdict. Cf, Nelson v. Adams USA, Inc., No. 99-502 (2000).[3] Certainly, the Supreme Court of Ohio found no constitutional deficiency in how the lower

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[3] In Nelson, this court found that an individual's due process rights were violated by how a district court applied the Federal Rules of Civil Procedure. The district court permitted a pleading to be amended to allege personal liability against a corporate officer and shareholder who was not previously a party to the litigation and, more importantly, permitted judgment to be rendered immediately against the individual upon the amendment of the pleading. This court held that the absolute denial of the individual's right to defend against the amended claims was a violation of his due process rights. Conversely, the lower state courts' decisions in this case did not absolutely deny petitioner any right to protect her interests. Instead, the lower state courts' decisions only confirmed that petitioner had failed to timely protect her rights and, essentially, had waived any post-judgment recourse. Indeed, the fallacy of petitioner's argument is demonstrated by the fact that respondents' motion simply could not have influenced in any way petitioner's decision to not timely file a motion for new trial since respondents' motion was not filed until late on the 14th day after the entry of judgment on the jury's verdict. Similarly, the timing of the filing of respondents' post-trial motion nonetheless left petitioner with more than two weeks to file a notice of appeal had petitioner ever been intent on appealing the jury's verdict.

state courts interpreted and applied the rules of civil and appellate procedure that it had promulgated.

3. Ultimately, this case does not raise an important due process of law issue. Petitioner does not constitutionally challenge the Ohio Rules of Civil or Appellate Procedure as promulgated or the Ohio Supreme Court's constitutional authority to promulgate such rules. Instead, petitioner complains only of how the state courts of Ohio applied their procedural and appellate rules and complains that her constitutional rights were violated because that is the only way for her to gain this court's attention. However, just as the Supreme Court of Ohio rejected petitioner's subterfuge, so should this court.

Essentially, the only post-trial motion filed by petitioner directly challenging the jury verdict or the state trial court's entry of judgment on the verdict was filed on July 13, 2000, which was 59 days after the entry of judgment on the verdict and patently untimely pursuant to Ohio Rule of Civil Procedure 59. Due to this failure and her corresponding failure to file a Notice of Appeal with the intermediate state appellate court within 30 days of the filing of the May 5, 2000 entry of judgment on the verdict, petitioner's only hope of pursuing an appeal was to argue that respondents' one post-judgment motion extended her time to appeal until the state trial court ruled on this post-judgment motion. Fundamentally, petitioner's argument is that respondents' motion, which was filed on the 14th day after the entry of judgment on the verdict, extended every possible deadline for post-judgment relief or activity that was imposed upon her. Unfortunately for petitioner, though, respondents' motion did not extend her time to appeal.

Respondents' post-trial motion was directed solely to having the court grant a credit against the jury's verdict in an amount equal to what the parties had agreed several years prior to the trial of the case. Essentially, the credit was due to respondents because of an advance payment made on behalf of petitioner in satisfaction of a subrogation claim and was due in accord with a 1994 written agreement with petitioner's then-counsel. The courts of Ohio have long recognized that credits for advance payments are the proper subject of post-judgment reduction or set-off against judgments. Edwards v. Passarelli Bros. Automotive Service, Inc. (1966), 8 Ohio St. 2d 6; Chambers v. Pinson (1966), 6 Ohio App. 2d 66; Kaufmann v. Phillips (1997), 120 Ohio App. 3d 453; Thompson v. Elbert (Feb. 21, 2001), Summit App. No. 99CA007476, unreported.

Ohio law has never considered a motion for credit against a judgment to be made pursuant to Ohio Rule of Civil Procedure 59 nor has such a motion ever been subject to the 14 day filing requirement of Ohio Rule of Civil Procedure 59. Moreover, petitioner has never challenged this legal authority in this case and has never argued that a credit against the jury's verdict, per se, violates her due process rights. Again, petitioner's real quarrel is with how the state courts of Ohio have interpreted their procedural and appellate rules in accord with the applicable authority, but petitioner has offered no sensible or meritorious explanation of how this interpretation violated her constitutionally protected due process rights.

Petitioner's efforts to persuade this court to ignore the fact that not every post-judgment or post-trial motion extends a party's time to appeal must be rejected. Petitioner's efforts to persuade this court that the Ohio Rules of Civil and Appellate Procedure and the authority

interpreting those rules should be ignored so that she can pursue an appeal in a situation where she otherwise did not protect her rights also must be rejected. Petitioner's efforts to establish that she was mislead into not protecting her rights and that some constitutional violation occurred could not be farther from the truth. Indeed, petitioner's efforts completely fail to recognize that the only reason that respondents' post-trial motion was necessary was because she and her trial counsel refused to honor an express and irrefutable agreement between the parties and, under the circumstances, petitioner's efforts to profit from this conduct must be rejected. Ultimately, petitioner's contentions in this case are the worst kind brought before this court--completely devoid of any genuine constitutional significance and designed only to perpetuate litigation which should have been concluded long ago.

II. THIS COURT SHOULD DECLINE TO REVIEW PETITIONER'S ARGUMENT CONCERNING WHETHER THE STATE TRIAL COURT'S OCTOBER 31, 2000 JUDGMENT VIOLATED HER DUE PROCESS RIGHTS AND WHETHER THE STATE INTERMEDIATE APPELLATE COURT'S APRIL 23, 2001 DISMISSAL OF HER APPEAL VIOLATED HER DUE PROCESS RIGHTS BECAUSE PETITIONER FAILED TO RAISE THOSE ISSUES IN THE STATE INTERMEDIATE APPELLATE COURT AND DID NOT FIRST RAISE THEM UNTIL ATTEMPTING TO APPEAL TO THE SUPREME COURT OF OHIO.

This court has a long tradition of refusing to consider arguments which were not properly raised at the first available opportunity. T.R.W. Inc. v. Andrews, - U.S. -, 122 S. Ct. 441, 443, - L. Ed. 2d - (2000); Berry v. Doles, 438 U.S. 190, 198, 98 S. Ct. 2692, 2697, 57 L. Ed.

2d 693 (1978). In this case, petitioner did not raise in the state intermediate appellate court any issue regarding the constitutionality of the state trial court's rulings on the post-trial motions. Further, in response to respondents' motion to dismiss filed in the state intermediate appellate court, petitioner made absolutely no argument that her due process rights would be violated if her appeal was dismissed. Similarly, it was not until the filing of her Petition in this case that petitioner ever framed her constitutional challenge on an alleged "conflict of decisions among the states" or on an alleged "protected property interest." Indeed, even when she for the first time raised a constitutional challenge in the Supreme Court of Ohio, petitioner only based her contention that her due process rights were violated on her "form" versus "substance" argument. As petitioner did not raise her constitutional challenges properly and as she is now attempting to base her challenges on arguments which she did not raise until she reached this court, her Petition for a Writ of Certiorari must be denied.

CONCLUSION

Respondents respectfully request that this court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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